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COURT OF APPEALS
DIVISION TWO

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No. 34259-6-II

STATE OF WASHINGTON

BY



DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ELTON GILBERT,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John A. McCarthy, Judge

APPELLANT'S OPENING BRIEF

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P.M. 8-2-06

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A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal constitutional due process rights to a fair trial were violated when the jury was not properly instructed on how to properly evaluate the testimony of former codefendants or accomplices.

2. Appellant was deprived of his Sixth Amendment and Article I, section 22, rights to effective assistance of counsel by counsel's repeated failures to perform as a reasonably competent attorney.

3. The prosecutor committed flagrant, prejudicial misconduct which violated appellant's state and federal rights to a fair trial.

4. The sentencing court erred, abused its discretion and violated the doctrine of separation of powers in denying a Drug Offender Sentencing Alternative (DOSA) based upon the fact that the charged offense was "serious."

5. The cumulative effect of the errors in this case violated appellant's state and federal rights to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was counsel ineffective in failing to request a cautionary instruction on proper evaluation of an accomplice's testimony where there was insufficient corroboration of that testimony, the testimony was the crucial link between Mr. Gilbert and the alleged manufacturing, the court would have been required to give the instruction, and the failure to give the instruction left the jury improperly instructed so that Mr. Gilbert did not receive a fair trial?

2. Did the prosecutor commit flagrant, prejudicial misconduct

by misstating the standard of reasonable doubt as met if the jury had about 60% of the “picture” of what occurred and described counsel’s job as to “create reasonable doubt” and counsel as trying to “muddy the waters” by questioning the state’s case?

Further, was counsel ineffective in failing to object to this flagrant, prejudicial misconduct where that failure resulted in the deprivation of his client’s right to a fair trial and to relieve the prosecution of its constitutionally mandated burden of proving its case beyond a reasonable doubt?

3. The Legislature chose to permit imposition of a Drug Offender Sentencing Alternative (DOSA) as an option for defendants who committed manufacturing of methamphetamine. Did the sentencing court err, abuse its discretion and violate the doctrine of separation of powers in denying appellant such a sentence on the basis that manufacturing of methamphetamine was a serious crime?

Further, is reversal required for counsel’s ineffectiveness where counsel failed to submit his client to a DOSA evaluation the court was going to want prior to even considering imposing such a sentence on his client’s behalf, the reason for the failure was that counsel was too busy, and counsel made no effort to have the matter continued to ensure fair, full consideration of his client’s request for a DOSA sentence?

4. Does the cumulative effect of errors compel reversal where the errors prevented appellant from receiving a fair trial with effective assistance of counsel?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jeffrey Gilbert was charged by information with unlawful manufacturing of methamphetamine. CP 1-2; former RCW 69.50.401(a)(1)(ii) (2003).

After trial before the Honorable John A. McCarthy on October 6 and 10-13, 2006, the jury found Mr. Gilbert guilty as charged. CP 21.¹ On December 2, 2005, Judge McCarthy imposed a standard range sentence. CP 24-35.

Mr. Gilbert appealed, and this pleading follows. See CP 38-48.

2. Overview of facts relating to offense²

On August 31, 2003, a woman named Patricia Whetstine called the Pierce County Sheriff's Department (PCSD) at about 10:15 in the evening and told them she was making methamphetamine in her apartment but thought she mixed some chemicals wrong and they were starting to smoke. 12-66, . She also said she was worried because of all the children around. Id. Mrs. Whetstine later admitted that she had not been manufacturing methamphetamine or mixing chemicals, and that she knew of no children in the area at the time. RP 65-66. She claimed she had lied to police because she did not think they would take the call seriously or respond, based upon

¹The verbatim report of proceedings consists of seven volumes, which will be referred to as follows: the five chronologically paginated volumes containing the trial, as "RP;" the motion proceedings of November 10, 2005, as "2RP"; the sentencing proceedings of December 2, 2005, as "SRP."

²Specific facts relevant to each issue are presented in the argument section, *infra*.

prior experience. RP 65-66.

Nevertheless, when the police arrived that night, Mrs. Whetstine kept up the charade, telling the officers the situation was “safe” because there was “no anhydrous” in the apartment. RP 27. The officers knew she was referring to anhydrous ammonia, a fertilizer and refrigerant which is also used in one type of methamphetamine manufacturing called the “Nazi” method. RP 27, 40-41.

The officers detained Mrs. Whetstine and one went into the apartment and “assessed the situation.” RP 27. He opened the closed door of a back bedroom Mrs. Whetstine had indicated, smelled chemicals, shut the door, got a respirator, went back into the room, and found a number of items he associated with manufacturing of methamphetamine, including a glass mason jar a third full with brown liquid, with a funnel stuck in the top. RP 29. He also saw another, similar jar, a pressure cooker, two “HCL” generators, a can of “Coleman” fuel, a glass pyrex baking dish with white powder all over it, a jar of muriatic acid, and several unused coffee filters. RP 29-33. There were also three plastic baggies with white powder residue in them next to an electronic gram scale on top of the television and on and below the desk in the room. RP 34.

Mrs. Whetstine was arrested for manufacturing methamphetamine, and she again repeated her story about mixing chemicals wrong, but also said “all drug smokers and users should go to jail” and that she told the police she had mixed the chemicals wrong to “get the police there faster.” RP 36. She also said she had been “cooking meth” since she was 31 and that she hired people to shoplift her lithium batteries and pills to make it.

a small shot glass with some clear liquid “and then some flecks.” RP 249-54. He also found a “walkie talkie,” which he said was commonly found at methamphetamine labs, and also some lighter fuel and a torch head and “barbecue igniter” which he said were not used for manufacturing but rather for imbibing the drug itself. RP 254-55. There was a container with two funnels in the top of it and brown liquid in it under the table in the room. RP 255. Many of the items were in a white bucket underneath the table, and in a red cooler. RP 257. Also found were some acetone, a plastic pitcher with powdery residue in it, two cans of starter fluid, a glass jar with rock salt in the bottom and a tub coming out consistent with construction of an HCL generator, a glass mason jar with a lid on about a third full with yellowish liquid and with used coffee filters in it and a “device” consistent with an HCL gas generator used to manufacture methamphetamine, a paper mask stained with something yellow, a glass jar with black electrical tape and aluminum foil lid which contained wet coffee filters, some drain opener, some muriatic acid, some unopened kitty litter, a metal pan, a page from a magazine with red powder on it the officer thought looked “very consistent with red phosphorus powder, a rusted steel cup, a large number of unused regular coffee filters, a box of stuff used to remove moisture from the air, a water bottle with a small amount of clear liquid, a vinyl dryer duct, a thermos with some liquid in it, some more muriatic acid, a glass jar with a small amount of white residue in it, a beaker with a hole on the side and some cloudy residue in the bottom, a glass plate with brown powder on it and a rusty blade next to it, a glass casserole dish with white residue on the bottom and a credit card which

appears to have been scraped it, in the name "Tammy DeWitt." RP 257-74. There was a glass bong made out of a children's tylenol bottle he thought could be used for smoking methamphetamine, some plastic tubing, and some trash bags with empty lye containers in them, some used coffee filters, a damp rag, a wadded up piece of aluminum foil, an electric hand grinder, a cardboard barrel with brown powder in it that he speculated was Ma Huang and "the most" he had ever found before, and a small plastic baggie with red powder in it, partially stripped lithium batteries, gloves, a blue vase fashioned into a "bong," electric scales, small ziploc bags with white powder residue inside, and other items. RP 257-87.

The red powder tested as "consistent with red phosphorus" but the machine used to confirm that was "not functioning" so it was based upon the tester's belief that "nothing else" reacts the same way. RP 363, 379. Several other samples tested positive for ephedrine and pseudoephedrine which could indicate that it came directly from ephedra or Ma Huang, and several others tested negative. RP 364-73. The forensic scientist who tested the materials admitted he did not specifically look for the presence of Ma Huang. RP 377. There was no methamphetamine in anything that he tested, nor was there anything which indicated there were "reactions which were leading up toward the manufacture of methamphetamine." RP 382.

In the same room, on the table where many of the items of contraband were found were some documents. RP 310-12. Most of the documents had the Whetstine name on them, including a Narcotics Anonymous guide in Mrs. Whetstine's name and a phone book with Mr. Whetstine's name on it. RP 310, 312. Also in the room were a bunch of

cancelled checks with Mr. Williams' name on them and a power bill with Mrs. Whetstine's name on it. RP 314-15. Mr. Williams' name was on several documents as well. RP 326. None of the documents had Mr. Gilbert's name on them. RP 311.

In the other rooms were empty syringes and evidence of injection of methamphetamine, a pressure cooker, a clear bottle half full of clear liquid, and, in the kitchen, "multiple jars" with brown or yellow liquid in them, plastic containers with residue, jar lids and a plastic funnel, and, in a white bucket at the entrance to the residence, brown residue in it and a gallon jug of muriatic acid, a plastic measuring cup and an empty glass jar. RP 297-300. In the living room was found a personal planner with Sean Olson's name on it, and a wallet with that name was found in a suitcase in the closet. RP 317-18. The planner had a phone number for a person named "Marlin Whetstine." RP 317-18. In the wallet was a jail photo with Sean Olson's name on it. RP 318.

Of the 38 fingerprints taken from various items, only one was of any "comparison value" and that print was positive for Mr. Gilbert's middle finger. RP 401-403. It was on a glass Mason jar that had suspected chemicals inside it. RP 407. There was no way to tell when that fingerprint had been placed on the jar. RP 401-407.

At the apartment, there was a big water cooler in the kitchen and people would come over all the time to get water from it. RP 114. Ms. Whetstine testified that she never used Mason jars as drinking glasses and the Mason jars she has ever had in her home were full of preserves were "little." RP 114. Her husband, Richard Whetstine, admitted that people

D. ARGUMENT

1. APPELLANT'S STATE AND FEDERAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHTS TO A FAIR TRIAL WERE VIOLATED

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

In this case, this Court should reverse, because Mr. Gilbert's rights to effective assistance of counsel were violated in multiple ways. First, counsel was ineffective when he inexplicably failed to request an instruction which would have told the jury the applicable law on the unreliability of testimony of codefendants or accomplices, and that failure ensured that Mr. Gilbert's due process rights to a fair trial by a properly instructed jury were violated.

a. Relevant facts

Mr. Gilbert was charged with committing the crime while "acting as an accomplice," and the named co-defendants in the information were Mrs. Whetstine and Mr. Williams. CP 1-2. Even before trial, counsel was aware that the prosecution's case was "basically centered around statements made by codefendants against" Mr. Gilbert who had "cut deals" to get their cases dismissed in exchange for testifying against Mr. Gilbert. RP 11. Counsel nevertheless did not propose or request a cautionary instruction

regarding proper evaluation of the testimony of a former codefendant /alleged accomplice. RP 11-12.

In closing argument, the prosecutor repeatedly relied on the testimony of Mrs. Whetstine, Mr. Williams and Mr. Whetstine as establishing that Mr. Gilbert was the person involved in the manufacturing. RP 450-58. Regarding Mrs. Whetstine, the prosecutor relied on her claim that she saw Mr. Gilbert with “supplies from manufacturing” and Ma Huang, as well as that he had “threatened” her. The prosecutor also declared that “[s]he has nothing to gain or lose by her testimony” because “[s]he wasn’t facing any charges” from the prosecution, so that proved she was “testifying truthfully.” RP 450-55.

Regarding Mr. Williams, the prosecutor relied on his testimony that he had “personally observed” Mr. Gilbert “extracting or trying to extract ephedrine from Ma Huang” one night, and that Mr. Gilbert was involved in the manufacturing but no one else was. RP 450-56. Mr. Whetstine was portrayed as someone who had no motive to lie as he did not have any pending charges in the case, despite his obviously close relationship with someone who had such charges, his wife. RP 450-56.

Although the prosecutor admitted that “Mr. Williams, obviously, was more invested in this case than the first two witnesses,” the prosecutor declared that Mr. Williams had taken “responsibility” for his role. RP 456. Indeed, the prosecutor declared that it was “important to remember” that the prosecution’s witnesses, Mrs. Whetstine, Mr. Williams and Mr.

Whetstine were not being tried for the crime:

It's important to remember that they are not the people on trial here. There is only one person on trial, and that's the defendant, Mr. Gilbert. And when you are considering your decision in this case, he is the only person you are deciding whether he is guilty or innocent.

And regarding his guilt, there is good reason to believe the testimony from Patricia and Richard Whetstine and from Wayne Williams. There are good reasons to believe what he said. They were there. They witnessed these things firsthand. They are eyewitnesses.

RP 456-57.

In his closing argument, counsel argued the defense theory that Mrs. Whetstine got upset with her husband for his extensive drug use and his manufacturing and wanted to cause him some damage, then "realized that she had made a mistake" and accused Mr. Gilbert, instead. RP 462-64. He noted that Mrs. Whetstine had been charged, and that Mr. Williams "had to come and testify over here because if he didn't testify, he knew that he could be recharged on this very same case." RP 470-77. He argued that the prosecution's case rested upon all three people who "all faced a certain amount of liability," including the Whetstine's, for what was found in the apartment, and thus had a motive "to not testify truthfully." RP 484. He argued that there was "no proof whatsoever, other than statements made by three civilians who all have a motive for testifying" against Mr. Gilbert.

RP 487.

In rebuttal closing argument, the prosecutor again asked the jury to find that Mr. Gilbert was "involved in the manufacturing process" based on "the testimony of the witnesses," and argued about how all of the evidence they said was there "was found in that apartment." RP 497.

b. Mr. Gilbert's rights to effective assistance of counsel were violated and he did not receive a fair trial

Counsel was prejudicially ineffective in failing to request a relevant, applicable jury instruction which would have cautioned the jury about reliance on just the word of a codefendant or accomplice in convicting. Both the state and federal constitutions guarantee the accused in a criminal case the right to a fair trial. See In re Personal Restraint of Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005); Sixth Amend.; Fourteenth Amend.; Art. I, sec. 3. Jury instructions only satisfy that right if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit each side to argue its theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

In Washington, the uncorroborated testimony of an accomplice or codefendant may support a conviction. See e.g., State v. Denney, 69 Wn.2d 436, 418 P.2d 468 (1966). In such cases, however, it is necessary to give a cautionary instruction about such testimony. State v. Harris, 102 Wn.2d 148, 152-53, 685 P.2d 584 (1984), overruled in part and on other grounds by, State v. McKinsey, 116 Wn.2d 911, 914, 810 P.2d 907 (1991). The instruction is required because there is an “obvious recognition of the danger that innocent persons may easily be convicted upon such uncorroborated testimony.” See State v. Callaway, 267 P.2d 970 (Wyo. 1954).

The relevant pattern instruction in Washington provides:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in light of the other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon

the relevant witness or witnesses is either uncorroborated or insufficiently corroborated. Harris, 102 Wn.2d at 152-53. The “corroboration” required is not simply corroboration of innocuous facts; it must corroborate the link between the accused and the charged crime. State v. Calhoun, 13 Wn. App. 644, 648-49, 536 P.2d 668 (1975). Further, the corroboration must not come from the testimony of the relevant witnesses but rather from other sources. See State v. Gross, 31 Wn.2d 202, 216-17, 196 P.2d 297 (1948), overruled in part and on other grounds by, Harris, 102 Wn.2d at 153. And to be sufficient, there must be a “substantial amount” of corroboration of the link between the accused and the charged crime, other than just the testimony. Harris, 102 Wn.2d at 154.

Thus, in Calhoun, it was reversible error to fail to give the instruction even though the jury only convicted on one of the three counts with which the defendant was charged. 13 Wn. App. at 646-47. The defendant was accused of three counts of armed robbery and, on the first two counts, admitted accomplices linked him to the crime. 13 Wn. App. at 646. For the third count, a non-participant in the crime and another accomplice linked him to the crime. 13 Wn. App. at 646. The only “corroborating” evidence for that count, other than that testimony, was that the defendant had left a gun and holster in a paper sack in the bedroom of another’s house for a short period of time while the robberies were occurring. 13 Wn. App. at 648. That evidence, without the testimony of the accomplices, was insufficient to provide the required “connection between the defendant and the crime charged.” Id.

Notably, in reversing, the Court specifically rejected the idea that

fact belonged to one or all of them. And counsel was obviously aware of the importance of those witnesses as he repeatedly recognized that it was those witnesses which provided the crucial link between the incriminating evidence of manufacturing in the Whetstine home and their guest, Mr. Gilbert. Yet counsel completely failed to even propose an instruction which would have properly informed the jury how to evaluate the prosecution's most important, crucial evidence in this case.

Reversal is required. Had counsel requested such an instruction, it would have been error not to give it. Giving such an instruction is mandatory where, as here, there was not sufficient corroboration. Harris, 102 Wn.2d at 153-54. Failure to give such an instruction if requested in this case would have compelled reversal. See, e.g., Harris, 102 Wn.2d at 153-54. And failure to even request the instruction clearly prejudiced Mr. Gilbert. Without the instruction the jury was not properly informed about the unique nature of the bulk of the prosecution's evidence and the great caution mandated by Washington law in relying on that evidence to convict. There could be no tactical reason for counsel to have failed to request this instruction, the failure to request the instruction resulted in the deprivation of a fair trial and an improperly instructed jury, and there can be no question in this case, given the paucity of the prosecution's other evidence linking Mr. Gilbert to the evidence in the Whetstine home. Reversal is required.

2. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
INEFFECTIVE

Reversal is also required based upon the prosecutor's misconduct

you don't have a lot of other information.

Now, of course, you have a reasonable doubt as to where that picture was taken from, which city. You absolutely have a reasonable doubt there.

Then you get a little more of the picture and you see some tall buildings. So at this point, well, you probably have a pretty good idea that it's not Fife. Fife doesn't have a lot of big buildings, so you can narrow it down to Tacoma or Seattle. But you still have a reasonable doubt as to what that picture is showing.

I will turn off the lights so you can see a little clearer. You have less than half a picture. You are narrowing it down, but you still don't know.

Bring in another piece of the picture. When another piece of that picture becomes clear, you know beyond a reasonable doubt that that's taken from Seattle. You know that because you have evidence that it's from Seattle. *And even though you can't see the entire thing, even though probably 40 percent of that picture is missing, you don't have a reasonable doubt as to where that picture is taken from.*

RP 500-501 (emphasis added). The prosecutor then told the jury that, in this case, they had "far more than 60 percent" as was sufficient to satisfy proof beyond a reasonable doubt regarding the picture, and that the "pieces of the puzzle fit together" so the prosecution's case was "more than speculation." RP 501. He later argued the jury was supposed to "[t]hink about what makes sense, what is reasonable, not what is merely possible," and that the "only reasonable conclusion from the evidence and from the law" was that Mr. Gilbert was guilty. RP 504-505.

b. These arguments were flagrant, prejudicial misconduct and counsel was ineffective

This Court should reverse, because the prosecutor committed misconduct with his arguments, in two ways. First, the prosecutor committed serious, prejudicial misconduct and relieved himself of the full

weight of his constitutionally mandated burden of proof by misstating the crucial standard of reasonable doubt. It is misconduct for any attorney to mislead the jury as to the relevant law. See State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). It is especially egregious when the attorney misstating the law is the prosecutor, because of the potential for such misconduct to have a great effect on the jury, and because of the prosecutor's quasi-judicial duties to ensure a fair trial. See Davenport, 100 Wn.2d at 763; State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Further, reasonable doubt is the touchstone of the criminal justice system, and correct application of it is in fact the "prime instrument for reducing the risk of convictions resting on factual error." Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, it is so vital to our system that failure to properly define it and the "concomitant necessity for the state to prove each element of the crime by that standard" is not just error, it is "a grievous constitutional failure." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Here, the prosecutor misstated the standard of reasonable doubt during the "picture" analogy by telling the jury that proof beyond a

reasonable doubt was simply proof sufficient for something to become “clear,” to be 60% complete, even if 40% was missing, and that it only had to find that the “pieces of the puzzle fit together.” RP 500-501. That is not proof beyond a reasonable doubt, it is proof something is more likely than not, a standard far closer to the preponderance of the evidence standard than the standard of proof beyond a reasonable doubt.

In making this argument, the prosecution relieved itself of the full weight of its constitutionally mandated burden of proof. That burden is clearly to prove its case “beyond a reasonable doubt,” not by 60%. It is not only misconduct but grave, serious and prejudicial misconduct when the prosecutor misstates the law of reasonable doubt so as to make it seem the jury should convict upon far less than the proper standard.

The prosecutor also committed flagrant, prejudicial misconduct in declaring that counsel’s role was to “create reasonable doubt” and “try to muddy the waters.” It is blatant misconduct for a prosecutor to impugn counsel’s integrity or disparage the role of defense counsel in closing argument. See State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984). Such remarks strike at the core of the right to counsel and compel reversal. Id.

Here, the prosecutor’s declarations told the jury that the defense attorney was improperly trying to obscure things from them and distract them from their sworn duty. Such comments are clearly misconduct. See, e.g., U.S. v. Friedman, 909 F.2d 705, 707 (2nd Cir. 1990) (comments that counsel was trying to “pull the wool” over the juror’s eyes was misconduct). Further, aside from the denigration and misstatement of

counsel's role, the obvious implication of those statements was that such unethical tactics were necessary in order to provide a defense because Mr. Gilbert was guilty. And the statements implied to the jury that the defense had a burden it did not - to "create reasonable doubt." This misconduct therefore could only have exacerbated the misconduct of misstating the true standard of reasonable doubt.

Reversal is required. Where there was no objection below, reversal is required where the misconduct is so flagrant and prejudicial that its damaging effects could not have been cured by instruction. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, review denied, 129 Wn.2d 1016 (1995). The misconduct went to the heart of the prosecution's case and the very standard the prosecution had to meet to satisfy its burden of proof. And that standard of proof is not just well-settled - it is the cornerstone of our entire justice system.

Further, the misconduct was of the kind which could not have been cured by instruction. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997). The prosecution's multi-media presentation of the picture and analogy were without doubt an effective tool for persuasion - otherwise an experienced prosecutor would certainly not use it. And the prosecutor's negative comments denigrating counsel were especially likely to have enduring effect as they were likely to have incited strong negative emotions against one who would be so unethical in representing one accused of a crime.

The evidence of manufacturing in the Whetstine's apartment was

significant but the evidence linking Mr. Gilbert to that alleged manufacturing was so thin as to be transparent. Given the weakness of the prosecution's case, and the nature of the misconduct, it is clear that the misconduct had a direct effect on the verdict. This Court should reverse.

In the alternative, if this Court finds that this misconduct could have been remedied by objection and curative instruction, reversal is required because counsel was again ineffective in failing to take necessary steps on behalf of his client. While the decision whether to object is usually considered "trial tactics," in egregious circumstances, on important testimony, the failure to object can be ineffective assistance. See State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

There could be no legitimate tactical reason for counsel to fail to object to the prosecutor's clear misstatement of the crucial standard of reasonable doubt. Without such an objection and a curative instruction, the jury was left with the improper impression that the prosecution would have met its constitutionally mandated burden of proof if it proved far less evidence than required to meet that burden. Without such an objection and curative instruction, the jury had its emotions inflamed against counsel as unethical and Mr. Gilbert as likely guilty. The obvious result of allowing such misconduct to occur without objection was to allow the jury to believe

that the state had far less to prove than it did, and that the defense was, in fact, trying to deceive the jury. Again, because the prosecution's evidence linking Mr. Gilbert to the manufacturing at the Whetstine home was so slim, the error clearly had a significant effect on the verdict. Reversal is required for counsel's ineffectiveness in failing to object to the misconduct even if the misconduct alone does not compel reversal.

3. THE SENTENCING COURT ERRED IN FAILING TO PROPERLY CONSIDER IMPOSING A DRUG OFFENDER SENTENCING ALTERNATIVE AND COUNSEL WAS INEFFECTIVE

In addition, reversal of the sentence is required because the sentencing court erred in categorically denying Mr. Gilbert the requested DOSA sentence based upon the nature of the crime, and because counsel was utterly ineffective in his handling of the DOSA request.

As a threshold matter, this issue is properly before the Court. While a defendant may not usually appeal a standard range sentence, an appeal is proper if the sentencing court erred as a matter of law or failed to follow a required procedure in imposing the sentence. See State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Thus, a decision to deny a request for a DOSA is reviewable if the court errs as a matter of law or relies on "an impermissible basis for refusing to impose" the requested sentencing alternative. State v. McNeair, 88 Wn. App. 331, 336, 944 P.2d 1099 (1977); see also State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003).

In this case, this Court should reverse the sentencing court's erroneous decision not to even consider a DOSA based upon an error of law, and also based upon counsel's utter ineffectiveness, again, at

sentencing.

a. Relevant facts

At sentencing, counsel stated that “clearly” Mr. Gilbert had substance abuse issues, and that Mr. Gilbert acknowledged having a drug problem. SRP 4. Counsel asked the court to impose a DOSA sentence, stating that the court could “look at my client’s past history to see that, to determine that he does have a drug substance abuse issue.” SRP 4-5. Counsel then told the court that Mr. Gilbert would be more likely to reoffend without treatment, and that his acts alleged at trial of trying to extract ephedrine from the plant “would lead one to think that he was going through some rather desperate measures to try to get” the drugs to support his habit. SRP 5.

The court then asked if Mr. Gilbert had been through “a DOSA screening,” and counsel responded:

Your Honor, unfortunately because of my trial schedule, that was just so slammed that I wasn’t able to get that done. But I believe that given his prior criminal history, which is also another drug offense, that he does suffer from a substance abuse issue.

SRP 6. The court then inquired whether a DOSA was “available on a manufacturing charge,” and the prosecutor agreed it was so. SRP 9. In denying the DOSA, the court stated:

Even though, as counsel points out, there was only one glass with your print on it, that is strong evidence that there was manufacturing going on at this particular location, and that you were involved in it, and that’s a serious crime. This is a serious offense. I am going to sentence you to 60 months.

SRP 9.

- b. The court denied the DOSA on an improper basis and counsel was again ineffective

This Court should reverse the standard range sentence imposed below, for two reasons. First, the court's categorical denial of the DOSA because the offense involved the "serious crime" of manufacturing was in error. At the time of the offense, the DOSA statute provided, in relevant part:

- (1) An offender is eligible for the special drug offender sentencing alternative if:
- (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);
- (b) The offender has no current or prior convictions for a sex offense or violent offense in this state, another state, or the United States;
- (c) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW . . . the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance; and
- (d) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of a sentence.

Former RCW 9.94A.660(1) (2002).

By its plain terms, the DOSA statute applied to *all* felonies which are nonviolent, not sex offenses, and do not involve a weapon special enhancement. See also former RCW 9.94A.030(19) (defining DOSA as "a sentencing option available to persons *convicted of a felony offense other than a violent offense or a sex offense*" otherwise eligible under former RCW 9.94A.660) (emphasis added). This includes manufacturing of

methamphetamine. See, e.g., State v. Poling, 128 Wn. App. 659, 666, 116 P.3d 1054 (2005) (defendant found guilty of manufacturing received a DOSA); State v. Busig, 119 Wn. App. 381, 386, 81 P.3d 143 (2003), review denied, 119 Wn. App. 381 (2004) (same). Indeed, although the original DOSA statute excluded those who were convicted of manufacturing methamphetamine from being eligible to receive a DOSA, that was specifically changed effective July 25, 1999. See Laws of 1995, ch. 108, § 3; Laws of 1999, ch. 197 § 4.

Thus, in crafting the DOSA scheme applicable to Mr. Gilbert, the Legislature chose to include even “serious” felonies such a manufacturing methamphetamine in its ambit. It is the Legislature’s function to determine matters of sentencing such as eligibility requirements for sentencing alternatives. See State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, cert. denied sub nom Ammons v. Washington, 479 U.S. 390 (1986). Indeed, the separation of powers doctrine prohibits one branch of the government from encroaching on the “‘fundamental functions’ of another.” State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002), citing, Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

It is not the function of a sentencing court to engraft new requirements onto a statutorily defined sentencing scheme or refuse to impose a sentencing alternative for an offender the Legislature has defined as eligible, based upon the court’s opinion that the offender should not have been eligible due to the nature of his crime. See, e.g., State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987). Instead, “[t]he role of the judiciary in construction of a criminal statute is especially circumscribed”

and must be limited because “courts may not read into a statute [even] things which it conceives the Legislature has left out unintentionally.” *Id.*

Here, the Legislature was fully aware of the nature of methamphetamine manufacturing and clearly decided to make someone who had been found guilty of that crime eligible for a DOSA. It did not “unintentionally” include manufacturing as a qualifying crime for a DOSA sentence - it *intentionally* did so. It was not within the sentencing court’s statutory authority to decide that persons convicted of that crime *should not* be eligible when the Legislature has decided they are. The court had a duty to exercise its discretion within the statutory framework and either grant or deny the request based upon the standards set forth by the Legislature, not its own conclusions about what standards should be applied.

Nor was the court’s cursory declaration that this crime was “serious” sufficient to support denial of a DOSA under former RCW 9.94A.660(1)(c). “Small” is a relative term for the purposes of the DOSA statute, and only those offenders involved in “significant drug manufacturing activities” are ineligible for a DOSA where the crime at issue is manufacturing methamphetamine. See State v. Bramme, 115 Wn. App. 844, 852, 64 P.3d 60 (2003). Thus, in Bramme, where the defendant had a history of abandoning previous substance abuse treatment, he admitted to participating in “cooking a 5,000 cold tablet batch of methamphetamine” which a detective testified could yield from 75 to 552 grams of methamphetamine, and there were 1.7 grams of methamphetamine just in discarded coffee filters at the manufacture site alone, it was proper to deny a DOSA based upon the “credible evidence. . .

pointing to the defendant's involvement in the production of a significant quantity" of the prohibited drug. 115 Wn. App. at 852-53.

It is not enough that manufacturing is a "serious" crime. An offender convicted of that crime is still eligible for a DOSA. The Legislature made that decision and, in effectively denying the DOSA request based upon the fact that manufacturing was "serious," the sentencing court erred and violated the doctrine of separation of powers.

Further, while the Legislature granted the court "wide discretion" in sentencing, that discretion must be exercised within the parameters set by the Legislature, and within the requirements of "principles of due process of law. State v. Grayson, 154 Wn.2d 333, 341, 111 P.3d 1183 (2005). Although no defendant is "entitled" to a DOSA as a matter of law, "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. 154 Wn.2d at 342. It is reversible error for a court to refuse to impose a sentencing alternative on an impermissible basis. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Refusing to consider the request because of race, sex, religion or the nature of the offense is impermissible. Id.³ Here, in refusing to consider imposing a sentence, the trial court specifically relied on the fact that manufacturing was, in general, a "serious offense."

In any event, reversal would still be required because of counsel's

³As an example, the Garcia-Martinez Court indicated a court would improperly refuse to exercise its statutorily defined discretion in declining a DOSA "if it takes the position, for example, that no drug dealer should ever get an exceptional sentence down[.]"

utter ineffectiveness in failing to make the request properly. Under the current statute, an “examination of the offender” and, *inter alia*, his or her drug addiction, treatment needs, possibility of reoffending and likelihood of responsiveness to treatment is required before a court may impose a DOSA sentence. See RCW 9.94A.660(2), (3) and (4).⁴ While former RCW 9.94A.660 did not require such an examination, it is obvious that the advocate requesting a special sentencing alternative, a departure from the presumptive standard range, must provide the court with at least minimal support for that request. See, e.g., Garcia-Martinez, 88 Wn. App. at 330 (not error to refuse to impose a DOSA when the court was not presented with “adequate factual or legal basis” to support going outside the standard range).

An attorney’s failure to present proper authority or evidence to support an argument for relief may be ineffective assistance. See e.g., State v. Greiff, 141 Wn.2d 910, 925-26, 10 P.3d 390 (2000); State v. Ermert, 94 Wn.2d 839, 851, 621 P.2d 121 (1980) (failure to be prepared to argue relevant law on a client’s behalf and act accordingly is ineffective assistance). Further, there can be no question there was no “tactical” reason behind counsel’s failure to submit his client to the relevant evaluation. Counsel himself admitted it had nothing to do with tactics and everything to do with his trial schedule.

⁴ Although subsection (2) indicates the court “may” order such an evaluation upon a proper motion, the subsection authorizing imposition of a DOSA, subsection (4), only permits a sentencing court to impose a DOSA sentence “[a]fter receipt of the examination report.” RCW 9.94A.660(4) (2006). Thus, it appears that only if such a report is prepared does a court have the authority to impose the alternative.

Further, counsel never even asked for a continuance to allow him to ensure that his client's request for a DOSA was properly supported with an evaluation. Any reasonably competent attorney in the same situation would have done so rather than go forward, at the risk of his client's liberty, unprepared to support the request for a special sentence he was making on his client's behalf. This Court should reverse and remand for resentencing in order to permit full consideration of the DOSA option, this time with an attorney who will actually get Mr. Gilbert the evaluation which will show his eligibility and support the request for a DOSA in this case.

4. THE CUMULATIVE IMPACT OF THE MULTIPLE
ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL
AND OF EFFECTIVE ASSISTANCE OF COUNSEL

Even if this Court finds that none of the many errors which occurred in this case support reversal on their own, this Court should nevertheless reverse based upon the cumulative effect of all of the errors. Such reversal is proper where, as here, the resulting trial is far from the constitutionally required fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

In this case, even if it was possible for the jury to have fairly evaluated the prosecution's case without the necessary instruction on caution in relying on the testimony of Mrs. Whetstine, Mr. Williams and Mr. Whetstine, they certainly could not have done so after being told that counsel's job was to "create reasonable doubt" and that the valid challenges to the strength of the prosecution's case were all part of that attempt to pull the wool over the jurors' eyes. And it could not have done so after being told that the complex standard of reasonable doubt was met if they were

only 60% sure of what had happened.

Further, the cumulative effect of defense counsel's ineffectiveness was so significant that Mr. Gilbert was completely deprived of his state and federal rights to effective assistance of counsel. Counsel did not simply fail to propose the single most important jury instruction for his client in his case, thus permitting the jury to convict without being properly advised on the caution it should have used in evaluating the claims of Mrs. Whetstine, Mr. Williams and Mr. Whetstine. Counsel also failed to object when the prosecution misstated the crucial standard of proof beyond a reasonable doubt, or to make any effort to ensure that the jury was properly instructed in order to ensure that the prosecution carried its true, full weight of that burden, rather than the much lesser burden the prosecutor described. And counsel failed to ask for a continuance in order to ensure that the sentence his client sought would be supported and thus have a chance of being ordered.

Mr. Gilbert did not testify. Instead, he placed his trust in his attorney. That trust was clearly misplaced in this case. The cumulative effect of the errors and the ineffectiveness compel reversal. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 2nd day of August 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Jeffrey Gilbert, DOC #248240, Washington State Reformatory, P.O. Box 777, Monroe, WA. 98272-0777.

DATED this 2nd day of August, 2006.


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